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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1028

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-AFL-CIO),

and

BENTON HARBOR MALLEABLE LOCAL No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-AFL-CIO),

Petitioners,

v.

BENTON HARBOR MALLEABLE INDUSTRIES,

Respondent

PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, International Union, UAW and Local No. 880, UAW, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court is not reported. The opinion of the Court of Appeals has not yet been reported in the West System, but appears at 39 LRRM 2689. The opinion of the District Court is printed in the record, pp. 20a to 28a. The opinion of the Court of Appeals is printed in the Appendix pp. 1b-9b; *infra*.

JURISDICTION

The Judgment of the Court of Appeals was entered March 29, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Under a collective bargaining contract which prescribes a grievance and arbitration procedure for disposing of any "difference * * * between the company and the union as to the meaning and application of this agreement", should a suit alleging breaches of the strike-lockout prohibition clause of the contract be stayed pending arbitration of the alleged breaches?

2. Under such a contract, should the very question of arbitrability of the alleged breaches, in the first instance, be decided by an arbitrator since that very question necessarily involves the "meaning and application" of that part of the contract which proscribes strikes and lockouts and prescribes arbitration of any "difference"?

STATUTES INVOLVED

The statutory provisions involved are Sections 201, 203 (d), and 301 of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 152, 153 and 156, 29 U. S. C. 171, 173(d) and 185, all respectively; and Sections 3 and 4 of the United States Arbitration Act, 61 Stat. 669, 9 U. S. C. 3 and 4. These statutes are set forth in the Appendix pp. 10b-14b, *infra*.

STATEMENT

On June 24, 1952, plaintiff-respondent, a Michigan corporation, producing malleable, grey iron and die castings for sale in interstate commerce, filed a civil complaint in the United States District Court for the Western District of Michigan against defendants-petitioners alleging, in substance, two separate breaches of contract. The action was filed under Section 301 of the Labor-Management Relations Act of 1947, as amended, (29 U. S. C. 185). These allegations of breach were based upon the claim that strikes in March and June of 1952 were in breach of a strike-lockout prohibition clause in the collective bargaining agreement of February 26, 1952 (pertinent portions of which are printed in R. 8a-15a) then existing between the petitioners

and the respondent.[1] On May 13, 1953, respondent filed an amended and supplemental complaint reiterating the allegations of the original complaint and adding an allegation of a breach of the strike-lockout prohibition clause commencing in April of 1953 (R. 2a-13a).

The breaches of contract alleged by respondent are set forth as violations of Article III, Section 1 of said contract of February 26, 1952 (R. 10a-12a). This article is entitled "Grievance Procedure". Said Section 1 also introduced a procedure for settling any "difference * * * between the company and the union as to the meaning and application of this agreement", culminating in Section 6 of said Article III which provides for an impartial umpire to which "either party may submit the unsettled grievance".

Relying on this contract language, petitioners, on June 3, 1953, filed in the District Court a motion, *inter alia*, to stay proceedings pending arbitration pursuant to Section 3 of the United States Arbitration Act (29 U. S. C. 3) (R. 16a-20a).

On May 28, 1956, the District Court for the Western District of Michigan handed down an opinion (R. 20a-28a) which, among other things denied petitioners' alternative motion to stay proceedings pending arbitration and on the same date entered an order in accordance with said opinion.

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[1] Included in the record reference to pertinent contract provisions at pp. 14a-15a is a one-page supplement to said collective bargaining agreement of February 26, 1952 which supplement is dated February 29, 1952. Though not included as an exhibit to respondent's complaint or supplemental complaint, a copy of this supplement, in the absence of an answer, was attached to one of petitioners' briefs to the District Court. The authenticity of this supplement is not in question, its genuineness having been admitted by the respondent's attorney in a hearing held before he District Court on December 2, 1954.

Petitioners appealed the denial of the alternative motion to stay to the Court of Appeals for the Sixth Circuit which, on March 29, 1957, entered a decision and order affirming the District Court. The Sixth Circuit's decision held that the provisions of the collective bargaining contract proscribing a grievance and arbitration procedure providing for settlement of differences between the parties as to the meaning and application of the contract excluded from its application those differences which arose as a result of an alleged breach of the strike-lockout prohibition clause. Prior to reaching this issue, the Sixth Circuit also held that the question of the arbitrability of the respondent's allegations would be decided, in the first instance, by the Court rather than an arbitrator; and that for want of an answer, the issues involved in respondent's cause of action were not sufficiently defined.

REASONS FOR GRANTING WRIT

1. The primary issue involved in this case is nothing less than the basic approach of federal courts to arbitration provisions in collective bargaining contracts. Reduced to its naked essentials, the decision of the Sixth Circuit herein held that an arbitration clause in such a contract, regardless of the generality of its wording, did not apply to that class of alleged breaches which involved the strike-lockout clause. The entire rationale of this decision, (which is supported by decisions of other circuits as noted in the decision herein, and is in conflict with the decisions of the Second circuit as discussed herein below) is that a general arbitration clause in a collective bargaining contract is intended to prevent breaches of the strike-lockout prohibition clause by providing a peaceful procedure for settling alleged breaches of at least some other contract

provisions (i.e., "grievances") which could motivate a strike or lockout, but is inapplicable to an alleged breach of said strike-lockout prohibition clause.

Petitioners believe this issue is ripe for decision by this Court. Since the adoption of the present Labor-Management Relations Act some ten years ago, there has been a constantly increasing volume of litigation under Section 301 of that Act (29 U. S. C. 185) in which plaintiffs have alleged violations of such strike-lockout prohibition clauses. A recent survey by the Bureau of National Affairs indicates that some 89% of collective bargaining contracts contain both arbitration provisions and strike-lockout prohibition clauses. "Collective Bargaining Negotiations and Contracts", pp. 51:1, 77:1. The volume of litigation which is developing on the interrelationship between arbitration provisions and alleged breaches of strike-lockout prohibition clauses is indicated by the cases cited by the Sixth Circuit on pp. 7b and 9b of its decision herein. These decisions are by no means an exhaustive list of even those cases where a stay was sought and refused. Most District Court cases where such a result was reached are not cited. Cases where the stay was allowed, including the very significant decision in *Signal Stat Corp. v. United Electrical Workers;* 235 F. 2d 298 (C. A. 1956), Cert. applied for, Docket No. 520, are not noted in the decision herein.[2]

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[2] In addition to Signal Stat, some cases in which stays were allowed in situations involving alleged breaches of strike-lockout prohibition clauses are: *Regent Quality Furniture Company v. Pollack*, 26 LA 302 (N. Y. Sup. Ct. April 13, 1956); *Lewittes and Sons v. United Furniture Workers*, 95 F. Supp. 851 (D. C. N. Y. 1951); *Brady Transfer and Storage Company v. Meat Drivers Union*, 30 LRRM 2535 (D. C. Ill. 1952); *Pennsylvania Greyhound Lines v. Amalgamated Association of Motor Coach Employees*, 98 F. Supp. 789, (D. C. 1951); reversed on other grounds, 193 F. 2d 327 (C. A. 3, 1952).

This increasing volume of litigation involves the public policy of the United States to encourage settlement of *all* labor disputes by arbitration and other methods agreed to by the parties concerned (29 U. S. C. 171 and 173.(d)). For the courts to encourage arbitration of labor disputes through granting stays in suits alleging *any* type of contract breach where the contract prescribes arbitration for settlement of any "difference * * * as to the meaning and application of this agreement" is in substantial furtherance of this public policy. The consequences are far more important than merely substituting one adjudicative body for another. A court trying a suit for alleged breach of a strike-lockout prohibition clause is necessarily solely concerned with the legal issue of a breach of contracts and the legal measure of damages. Arbitrators, on the other hand, can, should and do weigh other factors in their efforts to reestablish harmonious labor relations in the disputed area. For example, in arbitration awards such as *Par-Metal Products Corp.*, 4 LA 794, and *M. Singer and Sons*, 13 LA 533, arbitrators, while recognizing their authority to award damages for breaches of strike-lockout prohibition clauses, exercise their discretion to decline such awards because, under the circumstances, it would regenerate "antagonisms and finally have been dissipated" and not be in furtherance of the general purpose of industrial peace. While either party could, of course, challenge the arbitrariness or reasonableness of an arbitrator's award in a court, it is, nonetheless, equally true (whether the issues involved in a party's claim concern the existence or non-existence of a breach, the amount of damages for any such breach, the propriety of a disciplinary discharge, or any of the myriad subjects that might involve "meaning and application" of the contract), that the basic orientation of an arbitrator, making the *initial* determination will naturally be towards reestablishing a harmonious

bargaining relationship, while that of a court making the *initial* determination will necessarily be *solely* concerned with plaintiff's right (or lack thereof) to monetary compensation for the alleged contractual wrong, an extremely important and consequential contrast.

If the respondent here had submitted its claim of alleged breaches to an arbitrator in the first instance, it is not unlikely that a solution restoring satisfactory production and employment could have been reached through the arbitrator's decision or mediation, these not being mutually exclusive concepts in arbitration proceedings. By having recourse to court where the petitioners' request for a stay was denied, respondent clearly did not increase the possibility of a speedy restoration of satisfactory bargaining relationships. Petitioners contend that enforcement of recourse to arbitration through allowance of a stay is not only desirable in that it gives effect to the parties' basic preference for the arbitration approach to their allegations of breach as expressed in the contract's general arbitration provision,[3] but is in accord with the Congressional declarations of public policy in this area.

Signal Stat Corp. v. United Electrical Workers, 235 F. 2d 298 (C. A. 2, 1956), Cert. applied for, Docket No. 520, while involving certain language which differs in unimportant and irrelevant particulars from the contractual.

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[3] A very recent decision of the New York Court of Appeals, *In re Potoker*, 28 LA 344 (April 4, 1957) is apropos of this precise point. The court was dealing with an attempt to compel arbitration of certain claims. In approving the allowance of an injunction compelling arbitration, the court stated at pp. 346-7:

> "* * * the issue is not whether petitioner is right, but whether it is entitled to have the issues determined in the forum designated in the agreement. * * * Accordingly, whether or not the Guild called a strike in breach of the 'no-strike' clause, constitutes no defense to this motion to compel arbitration * * *."

language herein (see note 4, *infra*), cannot be harmonized with the decision herein. Inevitably, it would seem that the two cases, if submitted to the same court, would be similarly decided (i.e., the stay would have been granted by the Second Circuit in our case and denied by the Sixth Circuit on the *Signal Stat* contract).

The conflict between these two cases involves fundamentally different approaches to arbitration provisions in collective bargaining contracts in the numerous class of cases where one party alleges certain breaches of the strike-lockout prohibition clause, and perhaps otherwise. It is, no doubt, the differing approaches of the Circuits to public policy considerations, as well as to the even more basic issue of encouraging private arbitration, rather than the often minimal and inevitable differences in contract language that have produced the existing conflict among the Courts of Appeal. This is not to say that any two given contracts might not differ in important particulars so as to necessitate differing conclusions by a given court, following a given approach.[3] This, indeed, was the case in relation to the contracts involved in the Second Circuit's decisions in *Signal Stat v. United Electrical Workers*, *supra*, and *Markel Electric Products v. United Electrical Workers*, 202 F. 2d 435 (C. A. 2, 1953).[4] Substantial numbers of collective-bargaining contracts, however, including those involved in *Signal Stat v. United Electrical Workers*,

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[4] The arbitration provisions in *Markel* are distinguishable from those in *Signal Stat* (and from those involved herein) on two identical points. In *Markel*, the contract set forth a grievance and arbitration procedure for any difference "between the company and any employee" in contrast with the contractual language in *Signal Stat* which set forth a procedure between "the parties" (i. e., the company and the union). In *Markel* the contract provided only that the party "filing" the grievance could submit the same to arbitration as contrasted with *Signal Stat* in which it was provided that "either party" might so submit.

supra, and herein, contain so-called general arbitration provisions providing a means of settling differences or disputes between the parties (or the company and the union) as to the meaning and application of the agreement, with either party having the right to proceed to arbitration.

This basic conflict in approach and reasoning which inevitably appears to require conflicting results on exactly identical contractual language is highlighted by that portion of the Second Circuit's decision in *Signal Stat v. United Electrical Workers*, *supra*, where after noting the substantial differences in language between the contract

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The arbitration clause in the instant case is assimilable to that in *Signal Stat*, and is distinguishable from that in *Markel*, for the same reasons the Second Circuit distinguished *Signal Stat* from *Markel*. The fact that the contract in *Signal Stat* provides for "the difference, dispute or grievance" to be submitted by either party to arbitration is not a significant difference from the contract in the instant case providing simply that the "grievance" may be so submitted by either party. The contract in *Signal Stat* uses the term "grievance" as the equivalent of "difference, dispute or grievance", in the sentence providing for submission to arbitration. That sentence reads:

> "If no satisfactory settlement is arrived at, within 10 days of the date of the filing said grievance, then the difference, dispute or grievance shall at the request of either party, be immediately submitted for arbitration."

In the same way, "difference" in Section 1 of Article III of the contract herein must be equated with "grievance" in the phrase "either party may submit the unsettled grievance to an impartial arbitrator" in Section 6 of that Article (R. pp. 10a-11a). Otherwise, respondent's argument below that only an individual could institute a grievance would artificially restrict the broad provisions for settling the meaning and application of the contract to such differences as could be raised by an individual employee, an obviously artificial result in that it would exclude any number of matters in addition to alleged breaches of the strike-lockout prohibition from the grievance and arbitration procedure, including discharges which are treated in Article VI of the Contract (R. 12a-13a) and nowhere called grievances, as well as the numerous important disputes the union might wish to settle on its own behalf that could arise under Article II of the contract (R. 9a-10a) dealing with representation, bargaining committees, etc.

involved in its earlier decision in *Market Electric Products Co. v. United Electrical Workers*, *supra*, and the contractual language in the subject case (see note 3, *supra*), the Court remarks at p. 301:

> "* * * To the extent that the other cases cited by plaintiff require a contrary result, we think them erroneous. [Citing *United Electric R. & M. Workers v. Miller Metal Products*, 215 F. 2d 221, (C. A. 4); *International Union v. Colonial Hardwood Floor Co.*, 168 F. 2d 33, 35, 2102 (C. A. 4); *Square D Co. v. United Electric R. & M. Workers*, 123 F. Supp. 776, 2627]. We think their interpretations of similar arbitration clauses are unduly restrictive and achieve, by indirection, the same result as the old, and now generally rejected, judicial-aversion to enforcing arbitration agreements. [Citations.] Other cases, with which we agree, support our decision that the instant arbitration agreement covers a dispute arising from an alleged breach of the no-strike clause." [Citations including *Pennsylvania Greyhound Lines v. Amalgamated Ass'n.*, *infra*, this brief].

Inclusion of *International Union v. Colonial Hardwood Floor Co.* in the category of those cases which the Second Circuit felt, at least in part, "erroneous" (all of which cases were cited with approval by the Sixth Circuit herein though *Signal Stat* itself was not noted, perhaps because the Sixth Circuit itself recognized the basic irreconcilability) highlights this conflict of approach. *Colonial Hardwood* was the first Court of Appeals' decision involving application for a stay by a defendant who was alleged to have breached a strike-lockout prohibition clause. The court in Colonial Hardwood held, among other things, that a suit for a breach of a no-strike clause in a collective bargaining contract did not involve "any issues referable to arbitration" under

the arbitration language of the particular contract.[6] Apart from language considerations, however, the Fourth Circuit in *Colonial Hardwood* initiated a general approach to the question of stays pending arbitration in suits alleging breaches of strike-lockout prohibition clauses which has since been followed by other Circuits, including the Sixth Circuit in its decision herein. In *Colonial Hardwood*, the Fourth Circuit laid down a general rule of construction to the effect that arbitration clauses were not intended to cover actions involving such breaches but, on the contrary, were intended to prevent strikes and lockouts by settling their motivating causes. "We believe it was this general reasoning and attitude which Judge Frank in *Signal Stat* condemned as "erroneous" and a restoration "by indirection * * * [of] the same result as the old, and now generally rejected, judicial aversion to enforcing arbitration agreements". The Sixth Court of Appeals herein quite apparently adopts this reasoning of the Fourth Circuit, in opposition to that of the Second Circuit, which has produced the differing results as between *Signal Stat* and the case herein on substantially similar contracts.

It is also, perhaps, worthy of note that while the Third Circuit has not passed directly on this point, the *Signal Stat* decision cites "*Pennsylvania Greyhound Lines v. Amalgamated Ass'n*, 98 F. Supp. 789, 791, reversed on other grounds, 193 F. 2d 327, (C. A. 3)" as one of those cases "with which we agree" and which "support our decision that the instant arbitration agreement covers a dispute arising from an alleged breach of the no-strike clause".

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[6] In fact, though the decision does not disclose the contract language, another court in *Lewittes & Sons v. Furniture Workers, supra*, points out that the contractual language in *Colonial Hardwood, specifically limited* the grievance and arbitration provisions to disputes involving "hours and other conditions of employment".

This *Greyhound* decision has particular significance in that at p. 791 it practically paraphrased the reasoning of the Fourth Circuit in *Colonial Hardwood*, succinctly rebutted this reasoning and reached a contrary result.

The increasing volume of litigation of this type in which federal courts are faced with deciding whether to compel resort to arbitration in accordance with general language prescribing a grievance and arbitration procedure for settling differences, or permit one party to directly proceed with its claim to court and thus harden and freeze the dispute (i.e., tend to indefinitely prolong the strike or lockout) in contradiction of federal public policy and present day concepts of flexible and pragmatic labor relations, would seem to require treatment of the issue presented herein by this Court. The basic conflict which exists between the Second Circuit (and perhaps the Third), and the Fourth and Sixth Circuits (and probably the Seventh) cannot be avoided. Each suit involving general arbitration language in which a stay is denied at least minimizes the reversal of the preexisting adverse judicial climate to arbitration agreements intended by Congress in its passage of the United States Arbitration Act some thirty years ago (9 U. S. C.). See *Sturges & Murphy, Some Confusing Problems Relating to Arbitration Under the United States Arbitration Act*, 17 Law and Contemporary Problems 580. Such denials likewise minimize public policy favoring arbitration and early settlement of *all* disputes under collective bargaining contracts. The decision herein, as well as the decisions of other Circuits, not only conflict with the Second Circuit's decision in *Signal Stat Corp. v. United Electrical Workers, supra* but are at least generally inconsistent with much earlier decisions of that Circuit involving commercial arbitration provisions. See *Shan-*

feroke Coal and Supply Co. v. Westchester Service Corp., 70 F. 2d 297 (C. A. 2, 1934), aff. 293 U. S. 449, 55 S. Ct. 313 (1935); *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F. 2d 978 (C. A. 2, 1942). In the case of *In re Pahlberg Petition*, 131 F. 2d 968 (C. A 2, 1942) the court quotes from the famous English case of *Heyman v. Darwins* (1942) A. C. 356 the following language which, petitioners contend, should be established by this Court as a guide to all lower federal courts in their consideration of cases under Sections 3 and 4 of the United States Arbitration Act:

> "* * * But, in a situation where the parties are at one in asserting that they entered into a building contract, but a difference has arisen between them whether there has been a breach by one side or the other, or whether the circumstances which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen 'in respect of,' or 'with regard to,' or 'under' the contract, and an arbitration clause which uses these, or similar expressions should be construed accordingly."

2. The Sixth Circuit herein also declined to recognize that general arbitration language should, in the first instance, require the basic issue of the arbitrability of the claim of alleged breach of the strike-lockout prohibition clause (which question of arbitrability is controlled by the meaning and application to be given the grievance and arbitration provisions of the contract) to be submitted to an arbitrator. The court apparently based this decision on the statutory language of Section 3 of the Arbitration Act. (App. 13b), which provides in part that "the Court * * *, upon being satisfied that the issue involved in such

suit or proceeding, is referable to arbitration under such an agreement" shall issue a stay.

There are relatively few decisions on the point but the Sixth Circuit herein is in seeming conflict with the First Circuit's decision in *United Electrical Workers Local 205 v. General Electric Company*, 233 F. 2d 85 (C. A. 1, 1956), which decision has been appealed to and argued before this court on March 26, 1957 (Docket No. 276), and on the date of printing of this petition, was awaiting decision. In that decision, though dealing with an application for an order compelling arbitration under Section 4 of the Arbitration Act (App. 13b), the court states at p. 101:

> "* * * [An] arbitration clause, either expressly or by broadly stating its scope to include disputed interpretations of any contract term, may refer the very question of arbitrability to the arbitrator for decision * * *. Thus the district court must first determine whether the contract in suit puts matters of arbitrability to the arbitrator or leaves them for decision by the court. If it is the latter, the court must decide such points before it can give relief *under Sections 3 or 4 of the Arbitration Act.* If it is the former, and the applicant's claim of arbitrability is not frivolous or patently baseless, an order can be given, with the decision on arbitrability to be made in the arbitration proceedings that follow * * *." (Emphasis supplied.)

Judge Magruder apparently saw no difference in principle between stay cases and those in which an injunction compelling arbitration is sought (i.e., Section 3 and Section 4 cases, respectively, under the Arbitration Act). The area of conflict would appear to center on whether the statutory language quoted above requires a different approach and differing results between Section 3 and Section 4 cases.

A different result would not be justifiable in principle, and is not necessitated by the statutory language which Judge Magruder apparently felt only injects the court in Section 3 cases to the extent of determining whether the moving party's claim that the issue is arbitrable is "frivolous or patently baseless".[7]

This specific problem is actually not clearly severable from the point discussed in Section 1, *supra*. On each issue, the decision herein reflects an unrealistic and outmoded reluctance to recognize and enforce the parties' contractually expressed preference for arbitration of *any* differences as to the meaning and application of the contract. This reluctance is expressed by the court's refusal to recognize the general arbitration language, and its insistence on reading its own limitations into this language which clearly and generally prescribes arbitration for the settlement of all such differences; and example of the "old judicial hostility to arbitration" which it was "the clear intention of Congress" to reject in its enactment of the Arbitration Act. See *Kulukundis Shipping Company v. Amtorg Trading Corporation*, *supra*, pp. 983-985. In one instance, the Sixth Circuit decided that a question as to the meaning and application of the *arbitration* clause was, for certain general reasons, excluded from the arbitration procedure, and in the other instance, it determined that a question as to the meaning and application of the *strike-lockout prohibition* was, again, basically for the

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[7] Other decisions where the court referred the question of arbitrability of the issues involved in the dispute to arbitration for initial decision, all of which cases involved an attempt to compel arbitration rather than stay proceedings are: *Auto Workers Local 379 v. Jacobs Manufacturing Co.*, 120 F. Supp. 228 (D. C. Conn., 1953); *Post Publishing Company v. Cort*, 134 N. E. 2, 431 (Mass Sup. Ct. 1956); *Wilson Bros. v. Textile Workers Union*, 132 F. Supp. 163 (D. C. N. Y. 1954).

same general reasons, excluded from the application of the arbitration provisions. Such *policy* limitations of general arbitration provisions, in the absence of specific contractual limitations on the otherwise general arbitration provisions, can have only the most pernicious effect on the bulk of collective bargaining contracts which contain general grievance and arbitration procedures, with or without strike-lockout prohibition clauses.

Aside from the correctness of the position of the Sixth Circuit herein on these two closely related points, these issues appear to require settlement by this Court to remove the uncertainty which now beclouds the situation,[8] and which uncertainty can produce only harmful results. Even a decision contrary to the petitioners' contention would be an improvement on the current uncertainty if only that it would diminish the freezing effect of processing a claim of breach in court by avoiding the additional delay (during which a strike or lockout presumably would continue) involved in the application for stay and consequent appeals.

3. Also involved in the Sixth Circuit's decision is its determination that the issues involved in respondent's claim of alleged breaches of the strike-lockout prohibition clause were insufficiently defined. Of course, it is common in such cases that filing of the answer is postponed pending determination of the motion for a stay (*Signal Stat v. United Electrical Workers, supra*), such being au-

[8] The area of uncertainty is, of course, primarily in those several circuits which have not yet considered these problems, and in which a litigant could not know whether the circuit in question would follow the reasoning of the Second Circuit, or that exemplified by the Sixth Circuit's decision herein. Whichever of these two approaches would be adopted by a given circuit would naturally lead to a differing decision except in those relatively rare contracts where the language is so unequivocal either way as to permit only one result.

thorized by Rule 12(b) of the FRCP (28 U. S. C.). *Evans v. Hudson Coal Co.*, 165 F. 2d 970 (C. A. 3, 1948).

Other courts have commented that the court hearing the motion for a stay must accept the moving party's version of the issues. *Shanferoke Coal and Supply Co. v. Westchester Service Corp.*, 70 F. 2d 297 (C. A. 2, 1934), aff. 293 U. S. 449, 55 S. Ct. 313 (1935); *Wilson & Co. v. Fremont Cake and Meal Co.*, 77 F. Supp. 364 (D. C. Neb. 1948). The *Wilson* decision, though that of a district court, is particularly apposite because of its succinct treatment of this issue on p. 379 where the court states:

> "Then, it is contended that there is nothing in the case upon which arbitration may be had, that the only possible issue is the amount of damages. The plaintiff may consider—may even know—that contention to be true. But at this point in the pleadings, the court may not assume that it is. It cannot be known, with assurance, what issues will be raised by the defendant's answer. But even if the plaintiff's theory be factually accurate, and nothing is involved but damages, that question is arbitrable." [Citing cases.]

The Sixth Circuit's decision on this point is not only unreal, but inconsistent with that of the Second Circuit in *Shanferoke Coal and Supply Co. v. Westchester Service Corp., supra*, adopted by this court with approval, which, we contend, recognized that the purpose of Section 3 of the Arbitration Act would be largely negated if the parties had to first engage in extensive litigation to define the issues. That Congress intended to avoid this neutralization of Section 3 is the square holding of the Third Circuit in *Donahue v. Susquehanna Collieries Co.*, 138 F. 2d 3 (1943). The matter is discussed in Section 1 of that decision ap-

pearing on p. 4, which specifically refutes the unreal position of the Sixth Circuit herein on this question.[9]

The decisions of the Second and Third Circuits noted above on this point anticipate and prevent the delay and complications, which the Sixth Circuit's decision would inject into any motion for a stay pending arbitration. The Sixth Circuit's result has particularly pernicious consequences in those cases where the plaintiffs have alleged violations of collective bargaining contracts since, as heretofore noted, one of the chief advantages of arbitration in such cases is the promotion of a speedy resolution of the issues by adjudication and mediation within the primary focus of preventing any freezing of position and promoting a return of satisfactory, even harmonious, collective bargaining relationships and early resumption of production and employment. The Sixth Circuit's view that it is necessary to precisely define the issues prior to invoking the Arbitration Act is unsupported by authority, in conflict with decisions of the Second and Third Circuits, and negates a speedy and effective application of arbitration provisions to collective bargaining disputes. The consequences of the Sixth Circuit decision herein will neces-

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[9] This case presents important issues on the meaning and application of the strike-lockout prohibition clause to which this Court has already held there can well be implied exceptions, though the precise nature of such exceptions in any given case varies with the language of the contract as well as the collective bargaining history and other related factors. *Mastro Plastics Corp. v. N. L. R. B.*, 214 F. 2d 462 (2 C. A. 1954) aff. 76 S. Ct. 349 (1956); *N. L. R. B. v. Wagner Iron Works, et al.*, 220 F. 2d 126 (C. A. 7, 1955) cert. denied, 76 S. Ct. 406 (1956). The case also involves interpretation and application of the express exception to the strike-lockout prohibition clause contained in the February 29, 1952 Supplemental Agreement. (R. 14a-15a). These questions along with others which would be herein involved, including the obvious question of damages if respondent's allegations should be upheld, are particularly appropriate subjects for the arbitration process to initially treat. See *Council of Western Electric Technical Employees v. Western Electric Co.*, 238 F. 2d 892, 897 (C. A. 2, 1956).

sarily affect substantial numbers of such disputes which might otherwise be speedily settled or avoided altogether.

4. In summary, petitioners respectfully submit that all facets of the Sixth Circuit's decision herein, in view of the important general application of that decision and its conflict with decisions of other Circuits, should be considered and reversed by this Court.

CONCLUSION

For the reasons stated herein, it is respectfully requested that a petition for a writ of certiorari should be granted.

Respectfully submitted,

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Detroit, Michigan.

APPENDIX

OPINION AND JUDGMENT BELOW

(Filed March 29, 1957)

No. 12920

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT, etc., et al., *Appellants*, v. BENTON HARBOR MALLEABLE INDUSTRIES, *Appellee*.	APPEAL from the United States District Court for the Western District of Michigan.

Decided March 29, 1957.

Before: ALLEN, McALLISTER and MILLER, Circuit Judges.

MILLER, Circuit Judge. The appellee, a Michigan corporation, having its principal offices in Benton Harbor, Michigan, filed this action in the District Court against the appellants, International Union and Local No. 880, United Automobile, Aircraft and Agricultural Implement Workers of America, seeking damages by reason of strikes and work stoppages in violation of the collective bargaining agreement on the part of its employees at various plants of the appellee.

Jurisdiction is based upon Section 301 of the Labor Management Relations Act of 1947, Section 185, Title 29, U. S. Code, *Shirley-Herman Co. v. Internat'l Hod Carriers, etc.*, 182 F. (2d) 806, C. A. 2nd; *Hamilton Foundry & M. Co. v.*

International M. & F. Wkrs; 193 F. (2d) 209, 214, C. A. 6th; cert. denied 343 U. S. 966.

The amended and supplemental complaint, after making necessary jurisdictional allegations, stated that on February 26, 1952 the appellants and appellee entered into a written contract covering wages, hours of work, conditions of employment, the method of adjusting alleged grievances and other matters with respect to the employees of the appellee who were being represented by the appellants, which contract was in force and effect at the times complained of. Article III, paragraph 1 of the contract provided as follows:

> 1. Shall difference arise between the Company and the Union as to the meaning and application of this Agreement, or should any local trouble arise, an earnest effort shall be made to settle such differences, and it is agreed by the Union that there shall be no strike, slowdown or stoppage of work on the part of the Union or its members and there shall be no lockout on the part of the Company during the term of this contract. The parties shall in all instances resort to the following steps of the grievance procedure.

It further stated that the appellee had at all times fully performed and complied with the terms and conditions of the contract, but notwithstanding the said contract and in violation thereof and without exhausting the procedure provided in the contract for the settlement of grievances, the five strikes and work stoppages complained of had occurred, that the strikes and work stoppages were caused, authorized and condoned by the appellants and their officers and agents who, by reason thereof, had breached said contract, resulting in damage to the appellee in the sum of $6,000,000.

The appellants filed a motion to dismiss and in the alternative, a motion to stay the proceedings until arbitration of the matters complained of by the appellee shall have been had in accordance with the provisions of the U. S. Arbitration Act, Section 3, Title 9, U. S. Code. The Dis-

trict Judge denied both motions. This appeal is from that portion of the order which denied appellants' alternative motion to a stay pending arbitration. Sect. 1292(1) Title 28, U. S. Code; *Hoover Motor Express Co. v. Teamsters, Chauffeurs, etc.*, 217 F. (2d) 49, 51-52, C. A. 6th.

In the absence of a statute so providing, a party to a contract cannot as a matter of right have his differences or disputes with the other contracting party under the contract submitted to arbitration. There is no common-law right of arbitration. *Wolff Co. v. Industrial Court*, 262 U. S. 522; *Mengel Co. v. Nashville Paper Products & Specialty Workers Union*, 221 F. (2d) 644, 647, C. A. 6th. In some states he may acquire the right by such a provision in the contract, although in other states a provision requiring arbitration, while still executory, is not enforceable. *Gatliff Coal Co. v. Cox*, 142 F. (2d) 876, 881, C. A. 6th; *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 120-121. See: *Bernhardt v. Polygraphic Co.*, 350 U. S. 198, 203-205. Appellants' right to arbitrate the question of liability under the no-strike provision in the contract accordingly must depend upon the provisions of the contract. If the contract gives the right of arbitration, it is enforceable under the provisions of Sect. 3 of the *United States Arbitration Act*, Sect. 3, Title 9, U. S. Code. Sect. 3 of the Act provides:

> If any suits or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

It is appellants' contention that under paragraphs 1 through 6 of Article III of the collective bargaining agree-

ment the issues, tendered by the complaint are arbitrable issues, and being such, the court should grant a stay under Sect. 3 of the Arbitration Act. Whether this contention is sound depends upon the construction of the written contract. *Local 205, etc. v. General Electric Co.*, 233 F. (2d) 85, 101, C. A. 1st; *Annotation*, 24 A. L. R. (2d) pp. 757-761.

As a preliminary question, appellants urge upon us the proposition that the primary decision as to what is arbitrable should itself be left to an arbitrator operating under the contract, with the court confining itself to granting a stay pending the arbitrator's ruling on this issue and the arbitration itself, if the arbitrator decides the question is arbitrable under the contract. They contend that the arbitrator's ruling that the question is an arbitrable one can be reviewed by the court later at the same time when any award is brought before it for review. They point out that arbitration of disputes between management and labor is in the public interest in that it is conducive to bringing about the peaceful solutions of labor disputes, that the modern day approach to the problem favors such procedure, and that if the claim of the right to arbitrate is not frivolous or patently baseless, the final review of all questions by the court prevents irreparable injury to either party. They liken the power of the arbitrator to decide such an issue to the power of the court to pass on the question of its jurisdiction in a cause brought before it before passing on the merits.

Conceding for the purpose of argument the practical desirability of such a rule, it is not our province to put it into effect if it is contrary to settled principles of law. We are reminded that "history convinces us that the hoary though probably misguided judge-made reluctance to give full effect to arbitration and agreements cannot now be ignored by us as a matter of federal law without a pretty explicit statutory basis for so doing." *Local 205, etc. v. General Electric Company, supra*, 233 F. (2d) 85, 96, C. A. 1st. As pointed out in that case (p. 101), such a procedure can be provided by the arbitration agreement if the parties so desire, but whether they have done so is a prob-

lem of contract interpretation. As said in *Local 379, etc. v. Jacobs Mfg. Co.*, 120 F. Supp. 228, 231, D. C. Conn.: "Resolution of the 'jurisdiction-to-decide jurisdiction' must depend upon the provisions of the contract." If we recognize the settled rule that a party to a contract has no right to arbitrate a dispute under the contract unless the contract so provides, it seems to necessarily follow that he has no right to arbitrate the question of arbitrability unless the contract so provides. This is clearly the rule under the Arbitration Act, which provides in Sect. 3 that "the *court* in which such suit is pending, *upon being satisfied* that the issue involved . . . is referable to arbitration under such an agreement" shall stay the trial pending arbitration. (Emphasis added.) We are of the opinion that the question of whether an issue is an arbitrable one under a contract of arbitration is a legal question for the Court rather than for the arbitrator in the absence of a contract giving the arbitrator such jurisdiction. We do not find any such provision in the contract now under consideration. *Annotation*, 24 A. L. R. (2d) p. 760.

Proceeding to the question of whether the issue involved in this suit is referable to arbitration under the contract, we have difficulty in ascertaininng what the issue is. The appellants have filed no answer. Their motion for a stay and the affidavit in support of it does not state what the issue is. In the present state of the record liability is not denied either by a traverse or by confession and avoidance. Outside of the record, we were not able to ascertain in the oral argument of this appeal what issue would be presented to the arbitrator other than the amount of damages. Appellants contend that the word "issue" as used in the Act does not mean an issue made by the pleadings, but should be construed in its broad, common sense meaning of "claim," which is satisfied by reading the allegations of the complaint. *Donahue v. Susquehanna Collieries Co.*, 138 F. (2d) 3, 4, C. A. 3rd. Assuminng that the words "issue involved in such *suit*" (emphasis added) means merely an undenied, unsatisfied claim, about which we have some doubt, we are still not able to determine whether the claim is one "referable to arbitration" unless we know the

nature of the defense to it. If there is no valid defense and the failure or refusal to pay is merely an attempt to postpone the day of reckoning or possibly because of a present inability to pay, it would not be an arbitrable claim or issue. In some jurisdictions lack of good faith in presenting an alleged issue prevents the claim from being an arbitrable one. *Annotation*: 24 A. L. R. (2d) pp. 762-764.

If liability is to be denied, there are several possible defenses that might be asserted if supported by the facts, as yet unknown to us. In a suit for breach of contract possible defenses include invalidity of the contract, either as a matter of law, or because of lack of authority to execute the contract, or because of fraud or duress in its execution, or by mutual cancellation of the contract at a later time. Such defenses would not involve a "difference . . . between the Company and the union as to the meaning and application of this agreement" as provided in Article III, paragraph 1. *Annotation*: 24 A. L. R. (2d) pp. 767-769. Repudiation of the contract by the Company or admitted failure or refusal to perform its obligations thereunder are other possible defenses not involving the meaning of the contract. Breach of contract might be admitted, coupled with a denial that any damage was caused thereby, with the unions contending that the alleged loss of business was due to a change in business conditions, increased competition, mismanagement, or other shut-downs in no way connected with the strikes. The possible issues are numerous and varied, some referable to arbitration, others clearly not. The Arbitration Act requires the court to be "satisfied that *the issue involved* in such suit or proceeding is referable to arbitration . . ." (emphasis added), before a stay is granted. In the present state of the record, we are not so satisfied. *Metal Polishers, etc. v. Rubin*, 85 F. Supp. 362, E. D. Pa.

If we assume that an issue has been made which in some form denies liability for the strikes, we are nevertheless of the opinion that a proper construction of the contract provisions does not entitle the appellant to a stay pending arbitration.

Article III, paragraph 1; contains an unequivocal, unconditional obligation not to strike or engage in a work stoppage during the term of the contract. It recognizes that a "difference" might arise between the Company and the union which, if not settled, would lead to a strike. It looks to a settlement of that difference by use of the grievance procedure, but there is nothing in that paragraph which relieves the unions of their unconditional obligation not to have a strike. The "difference" or "grievance" is to be arbitrated to a final conclusion, but while it is being arbitrated and regardless of how it is eventually decided and terminated, there is to be no strike. The thing to be arbitrated is the "difference" or "grievance," not the right to strike or any claimed justification for the strike. There was no right to strike. The arbitration called for by this paragraph of the contract was to be used instead of a strike, not to determine whether the strike was justified after it had occurred. The right to strike was not arbitrable issue under this paragraph of the contract. *Shirley-Herman Co. v. Internat'l Hod Carriers, etc., supra*, 182 F. (2d) 806, 810, C. A. 2nd; *International Union, etc. v. Colonial Hardwood Flooring Co.*, 168 F. (2d) 33, 35 C. A. 4th; *United Electrical, R. & M. Wkrs. v. Miller Metal Products, Inc.*, 215 F. (2d) 221, 223, C. A. 4th; *Markel Electric Products Inc. v. United Electrical, R. & M. Wkrs.*, 202 F. (2d) 435, 437, C. A. 2nd. See also: *Cuneo Press v. Kokomo Paper Handler's Union No. 34*, 235 F. (2d) 108, C. A. 7th, cert. denied, 352 U. S. 912.

Appellants also rely upon Article III, paragraph 6, of the contract, which reads as follows:

> In the event a grievance relating to the meaning or application of this Agreement is not satisfactorily disposed of in the foregoing steps of the grievance procedure, either party may submit the unsettled grievance to an impartial arbitrator agreed upon by them, provided notice is given to the opposite party within fifteen (15) days after the Shop Committee-Management meeting (above referred to) of intention to arbitrate. The parties shall bear equally the expenses of arbitration. The Arbitrator shall have no

> power to add to, ignore or modify any terms of this Agreement. His decision shall be final and binding upon both parties to this Agreement.

They contend that the alleged breach of the no-strike agreement is a "grievance relating to the meeting or application" of the agreement, which under said paragraph is an arbitrable issue. This court has previously considered this question. We said in *Hoover Motor Express Co. v. Teamsters, Chauffeurs, etc., supra*, 217 F. (2d) 49, 53-54, C. A. 6th, "In the commonly accepted meaning of the term 'grievance' violation of a no-strike provision in a collective bargaining agreement does not constitute a grievance" and "the violation of the no-strike agreement of the collective bargaining contract is not a grievance." Other courts have also so held. *International Union, etc. v. Colonial Hardwood Flooring Co., supra*, 168 F. (2d) 33 C. A. 4th; *Harris Hub Bed & Spring Co. v. United Electrical, R. & M. Wkrs.*, 121 F. Supp. 40, 43, M. D. Pa.; *Bassick Company v. Bassick Local 229*, 126 F. Supp. 777, 779, D. C. Conn.

Paragraph 6 of Article III must be read in conjunction with the preceding paragraphs 1-5 of the Article. Paragraph 1 provides that the parties shall in all instances "resort to the following steps of the grievance procedure." Paragraphs 2-6 are the "following steps." Paragraph 2 provides: "Any *employe* having a grievance shall first submit the same to the steward of his department or to his foreman." (Emphasis added.) Paragraphs 3, 4 and 5 deal wtih successive proceedings if the grievance is not settled at different levels of negotiations, using the term "the unsettled grievance" and any grievance which "cannot be settled." Paragraph 6, as hereinabove set out, finally provides for the submission of "the unsettled grievance to an impartial arbitrator." The grievance referred to in paragraphs 2-6 is a grievance on the part of an employe against the employer, not a grievance by the employer against the union. There is nothing in paragraphs 2-6 inclusive which provides for arbitration of a claim for damages by the *employer* against the union. *Square D. Co.*

v. United Electrical, R. & M. Wkrs., 123 F. Supp. 776, 783, E. D. Mich.

There being nothing in the collective bargaining agreement which gives the appellants the right to submit to arbitration the question of its liability for the claimed breach of its no-strike obligation, the U. S. Arbitration Act has no application and the stay order was properly denied. *Hoover Motor Express Co. v. Teamsters, Chauffeurs, etc., supra*, 217 F. (2d) 49, 54, C. A. 6th.

The judgment is affirmed.

STATUTES INVOLVED

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29 U. S. C. 171 (Sec. 201):

SEC. 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of duties; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

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29 U. S. C. 173(d) (Sec. 203):

Sec. 203.

(a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lockout, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing

collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

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29 U. S. C. 185 (Sec. 301):

Sec. 301.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon

an officer or agent of a labor organization, in his capacity as such shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

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9 U. S. C. 3:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. July 30, 1947, c. 392, §1, 61 Stat. 669.

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9 U. S. C. 4:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties,

and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. July 30, 1947, c. 392 §1, 61 Stat. 669.